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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JOHN ERNEST BISHOP, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE: WHETHER THE PETITIONER WAS DEPRIVED OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN LIGHT OF AN ACTUAL CONFLICT OF INTEREST THAT EXISTED BETWEEN DEFENSE COUNSEL AND A FORMER CLIENT, WHO WAS THE PROSECUTION'S STAR WITNESS.

QUESTION TWO: WHETHER THE PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS IMPAIRED BY AN ACTUAL CONFLICT OF INTEREST THAT EXISTED BETWEEN DEFENSE COUNSEL AND A FORMER CLIENT, WHO WAS THE PROSECUTION'S STAR WITNESS.

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The United States of America

John Ernest Bishop, Jr.

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To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on April 7, 1993.

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Fifth Circuit in Case No. 92-5639, *United*

States v. John Ernest Bishop, Jr. entered in the above entitled proceeding on March 4, 1993, is attached as Appendix A. The order denying the petition for rehearing on April 7, 1993, is attached as Appendix B.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit on March 4, 1993, entered its opinion affirming the judgment of the District Court. On April 7, 1993, it denied the timely filed petition for rehearing. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

Due Process of Law

No person shall be . . . deprived of life, liberty, or property, without due process of law.

Sixth Amendment

Effective Assistance of Counsel

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This is a prosecution brought by the United States Government alleging a violation of 21 U.S.C. §§ 841(a)(1) and 846, and 18 U.S.C. § 2.

STATEMENT OF THE CASE

The petitioner, John Ernest Bishop, Jr., was indicted by a federal grand jury in the Western District of Texas and charged in a two (2) count superceding indictment with a conspiracy to distribute in excess of ten (10) grams of a substance containing a detectable amount of lysergic acid diethylamide ("LSD") and with distributing the same controlled substance, proscribed respectively by, 21 U.S.C. §§ 841(a)(1) and 846; and 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. (Vol. 1-121-122).

The government's theory of prosecution was that the petitioner, John Ernest Bishop, Jr., was a supplier of LSD and that Christopher John Kasper distributed the LSD to third parties. Bishop was never shown, however, to be actually involved in the nefarious activities of Kasper. The prosecution relied in principal part on the testimony of Kasper – who had cut a deal for lenient treatment – to implicate Bishop as to the specific allegations contained in the indictment. In light of the fact that Bishop never personally delivered any controlled substance to government agents, nor was ever shown to have had any contact with law enforcement officials, Kasper became the prosecution's star witness.

Prior to the conclusion of the defense's case, at a bench conference with the jury not present, the following colloquy took place:

> "(Defense counsel) Hootman: I want to request that I be allowed to take the stand. Chris Kasper came to my office before all this started, and was considering hiring me, and he told me that John didn't have anything to do with it.
>
> (Prosecutor) McCrum: Judge, we're getting into the fact of representation of counsel, for building a – for the defense. I don't think that's –
>
> Hootman: Basically it, attorney/client privilege is to encourage discussions between attorney and the client. This Mr. Kasper has already plead guilty.[1]
>
> McCrum: If he was a witness in this case, it should have come out long before this trial so that he could have gotten other counsel to do this. This is highly improper. After the trial's over, after jeopardy is already attached and this man now comes forward saying he's some kind of witness.
>
> The Court: I'm going to sustain the government's objection, Mr. Hootman. My concern is, he went to see you with regard to hiring you,

---

[1] The fact that Kasper had plead guilty to the identical charge and fact situation did not, somehow, eviscerate the attorney/client relationship he enjoyed with Hootman. *United States v. Martinez*, 630 F.2d 361 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 1373 (1980). Moreover, Kasper's decision to testify and "debrief" federal law enforcement authorities about his drug activities resulted in no waiver of the attorney/client privilege whatsoever. *United States v. O'Malley*, 786 F.2d 786, 794 (7th Cir. 1986).

> whether there was attorney/client privilege where he – he's waiving that privilege and also you being a witness in this case, and possibly knowing that you might be a witness in this case, and have gone throughout the trial, and we get to this stage and then you think you might be a witness, I think that causes some problems.
>
> So, I'm going to sustain the government's objection to you testifying with regard to any discussions you might have had with Mr. Kasper.
>
> Hootman: Okay. That's where we rest our case."

(Tape No. 92-104D; 05/21/92; 11:53:21).

No inquiry was made by the district court as to the exact contours of the attorney/client relationship that existed between Kasper and Hootman; nor was any effort made by the district court to determine whether Kasper would waive the privilege. Finally, the petitioner was never queried as to whether he even knew about the attorney/client relationship that existed between Hootman and Kasper, much less asked if he consented to or acquiesced in the waiver of such a conflict – assuming that waiver was appropriate or even possible. What is clear is that Kasper, a key government witness, had conferred with Hootman in his law office concerning the very facts at issue herein, that those discussions took place within the confines of the attorney/client privilege, and that statements were made which both served to exculpate the petitioner, as well as impeach and discredit Kasper, himself.

The Court of Appeals held that no conflict of interest was shown to exist in the case *sub judice;* despite the fact

that the district court made no inquiry as to the possibility of an actual conflict of interest and conducted no hearing in the matter, the Fifth Circuit concluded that the general rule that " 'a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court.' " *United States v. Ugalde*, 861 F.2d 802, 804 (5th Cir. 1988), *cert. denied*, 490 U.S. 1097, 109 S.Ct. 2447, 104 L.Ed.2d 1002 (1989), was not applicable, "because the record here is 'significantly complete to enable us to fairly evaluate the merits of the claim,' " *citing, United States v. Phillips*, 664 F.2d 971, 1040 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982), *overruled on other grounds*, 956 F.2d 1309 (1992). (Appendix A at 4-5).[2]

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[2] The Court of Appeals characterized the petitioner's claim as that of ineffective assistance of counsel (Appendix A at 1). The petitioner, however, raised an *additional* ground on appeal – one obviously associated with the ineffective assistance claim – that

> "[t]he appellant's due process right to a fair trial as guaranteed by the Fifth Amendment to the United States Constitution was impaired by an actual conflict of interest that existed between defense counsel and a former client, who was the prosecution's star witness."

(Brief for Appellant at 10).

The asserted deprivation of due process was not addressed by the Court of Appeals in its opinion of March 4, 1993.

Although the Fifth Circuit in its opinion never addressed the separate basis asserted below that the actual conflict of interest in the case *sub judice* constituted a violation of due process of law, that court has "always considered the undivided loyalty of counsel an essential to due process." *United States v. Alvarez*, 580 F.2d 1251, 1256, n.6 (5th Cir. 1978). *See, Wood v. Georgia*, 450 U.S. 261, 272, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981).

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's holding that the petitioner was not deprived of the right to effective assistance of counsel in light of an actual conflict of interest that existed between defense counsel and a former client, who was the prosecution's star witness, cannot be squared with decisions of this Court and other circuits.

A.

Constitutional Imperative of Conflict-Free Representation of Counsel

It is axiomatic that "[r]epresentation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interests." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), *citing, Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). It has been repeatedly recognized that

> "[t]he Sixth Amendment right to counsel implies much more than a minimum level of professional competence: even otherwise competent trial lawyers may sometimes find themselves in a position in which they are unable to render effective assistance of counsel. Thus, where defense counsel in a criminal trial represents one of several clients with conflicting interests, his effectiveness as a vigorous advocate for a particular defendant may be impaired by his commitment to other clients . . . *Undivided loyalty and fidelity of commitment is therefore the guiding principle in this important area of Sixth Amendment jurisprudence." United States v.*

Alvarez, 580 F.2d 1251, 1254 (5th Cir. 1978). (Emphasis added).

See also, Fitzpatrick v. McCormick, 869 F.2d 1247, 1254 (9th Cir.), *cert. denied*, 493 U.S. 872, 110 S.Ct. 203 (1989). "The right to effective assistance of counsel is so vital to a fair trial that courts are compelled to examine every potential infringement of that right with the most exacting scrutiny." *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir. 1979), *cert. denied*, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979).

B.

The Dilemma of Successive Representation

Even if counsel for the accused no longer represents a witness for the prosecution, this is of little moment as far as the Sixth Amendment is concerned. "[T]he absence of *simultaneous* representation is not determinative. In some circumstances, a defense lawyer's *prior* representation of a witness can give() rise to an actual conflict of interest. *Smith v. White*, 815 F.2d 1401, 1405 (11th Cir.), *cert. denied*, 484 U.S. 863, 108 S.Ct. 181 (1987). (Emphasis added). *United States v. Young*, 644 F.2d 1008, 1012 (4th Cir. 1981). Upon some showing or demonstration that defense counsel's prior representation of a witness was *either* "(1) substantially and particularly related to counsel's later representation of defendant, or (2) (that) counsel actually learned particular confidential information during the prior representation of the witness that was relevant to defendant's later case" incompatible or "inconsistent interests" are present. *Smith v. White, supra*, at 1405.

A defense lawyer faced with the duty and constitutional obligation of zealously confronting his client's accusers and subjecting highly damaging and inculpatory testimony to the "crucible of cross-examination", *see generally, California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), "inherently encounters divided loyalties" when the witness is a former client. *Lightbourne v. Dugger*, 829 F.2d 1012, 1023 (11th Cir. 1987), *cert. denied*, 488 U.S. 934, 109 S.Ct. 329 (1988). From both a public policy perspective and based purely on pragmatic considerations, it is clear why a deprivation of the right to effective assistance of counsel can occur. "A defendant is denied the effective assistance of counsel in those instances where an attorney is unable to cross-examine, or is chilled in the cross-examination of, a government witness because of the attorney/client privilege arising from counsel's prior representation of the witness . . . " *United States v. Soudan*, 812 F.2d 920, 927 (5th Cir. 1986), *cert. denied*, 481 U.S. 1052, 107 S.Ct. 2187 (1987), and cases cited therein. *See also, United States v. Martinez*, 630 F.2d 361 (5th Cir.), *cert. denied*, 450 U.S. 922, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1980).

In *United States v. Agosto*, 675 F.2d 965, 971 (8th Cir. 1982), *cert. denied sub nom., Gustafson v. United States*, 459 U.S. 834, 103 S.Ct. 77 (1982), the Court offered the following analysis of the problem:

> "[a] major source of conflicts in both successive and multiple representation cases is the attorney's receipt of privileged information from a witness or codefendant. Canon 4 of the Code of Professional Responsibility requires a lawyer to preserve the confidences and secrets of a client.

> Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client. *When an attorney attempts to represent his client free of compromising loyalties, and at the same time preserve the confidences communicated by a present or former client during representation in the same or a substantially related matter, a conflict arises.*
>
> In the successive representation situation, privileged information obtained from the former client might be relevant to cross-examination, thus affecting advocacy in one of two ways:
>
> (a) the attorney may be tempted to use that confidential information to impeach the former client; or
>
> (b) counsel may fail to conduct a rigorous cross-examination for fear of misusing his confidential information." at 971. (Emphasis added).

See also, United States v. Jeffers, 520 F.2d 1256, 1264-1265 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066, 96 S.Ct. 805, 46 L.Ed.2d 656 (1976); *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir. 1980); and *Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988), *cert. denied*, 488 U.S. 908, 109 S.Ct. 249 (1988).

In fact, courts have uniformly *disqualified* defense counsel from representing criminal defendants in situations where counsel had previously entered into an attorney/client relationship with a testifying government witness. This is so because "[t]he mere possession of a former client's and co-defendant's privileged communications poses the precise potential for conflict that the trial court (has) the discretion to avoid . . . " *United States v. Wheat*, 813 F.2d 1399 (9th Cir. 1987), *aff'd*, 108 S.Ct. 1692 (1987). *See, United States v. O'Malley*, 786 F.2d 786 (7th Cir.

1986); *United States v. Ditommaso*, 817 F.2d 201 (2d Cir. 1987); *United States v. Cannistraro*, 794 F.Supp. 1313 (D.N.J. 1992); and *United States v. Tocco*, 575 F.Supp. 100, 102 (N.D. Ill. 1983). As Judge Aspen reasoned in *Tocco*, an actual conflict of interest exists and "arises from the contrary interests of (defense counsel) in cross-examining the witness effectively on (defendant's) behalf and in maintaining the privileged confidences of the witness." *Id.*, 102.

C.

Divulgence of Potential Conflicts

It is beyond peradventure that defense counsel – any counsel – is obligated to immediately bring to the court's attention the existence of *any possible conflict* as soon as counsel becomes aware of it.[3] *United States Ex Rel. Robinson v. Housewright*, 525 F.2d 988, 992 (7th Cir. 1975). *See also, American Bar Association Standards for Criminal Justice, The Defense Function*, § 3.5(a) (1971), discussed in *Housewright, supra*; ABA Code of Professional Responsibility DR 5-105, EC 5-15 (1976); ABA Model Rules of Professional Conduct Rule 1.7(b) (Approved Draft 1983); and *Cuyler v. Sullivan, supra*, at 346.

The Texas Disciplinary Rules of Professional Conduct strictly prohibit both disclosure of confidential and privileged communications of a former client (Rule 1.05), as

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[3] In *United States v. Alvarez, supra*, the Court noted that "[t]he record discloses that both the court and the prosecutor were fully aware of the conflict of interest present in this case *at least one month prior to trial.*" at 1257. (Emphasis added).

well as undertaking the representation of a client if the representation will present a conflict of interest (Rules 1.06 and 1.09)[4]. And, of course, defense counsel Hootman was obviously aware, or at least should have been aware of the conflict in this case *prior* to the commencement of trial. It simply was no mystery to anyone that Christopher Kasper would be a crucial witness for the prosecution. Not only was Kasper named as an unindicted principal, (Vol. 1-121), he had entered into a plea agreement prior to trial to testify against the petitioner. (Vol. 1-159-160). Furthermore, Kasper was indicted as a co-defendant in the petitioner's original indictment in this case. (Vol. 1-241-242).

What is particularly problematic about the Fifth Circuit's opinion is that it fails to address the ethical violations and shortcomings presented herein. As will be discussed *infra*, this underscores the necessity for the conducting of an evidentiary hearing. Because Hootman failed to timely divulge the existence of a possible conflict to the district court and because Judge Prado made utterly no inquiry as to the issue when it arose at the conclusion of the trial, to summarily find no conflict of interest is simply unwarranted. Judge Prado, it is submitted, was required, *at a minimum* to initiate an inquiry. *See, Strouse v. Leonardo*, 928 F.2d 548, 555 (2d Cir. 1991), holding that "the trial court must initiate an inquiry when it knows or reasonably should know of the *possibility* of a conflict of interest." (Emphasis added).

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[4] The pertinent Texas rules of professional conduct are reproduced herein in Appendix C.

D.

Waiver of Conflict

While at least theoretically, a criminal defendant might be able in some circumstances to waive his right to conflict-free counsel, the present record is devoid of a knowing and intelligently made waiver by Bishop.[5] *United States v. Martinez, supra,* at 364. *See, Parker v. Singletary,* 974 F.2d 1562, 1571 (11th Cir. 1992):

> " '[A] defendant may waive the right to conflict-free counsel as long as the waiver is knowingly and intelligently made. To be knowing and intelligent, the defendant must be told (1) that a conflict of interest exists; (2) the consequences to his defense from continuing with conflict-laden counsel; and (3) that he has a right to obtain other counsel.' " *citing, Duncan v. Alabama,* 881 F.2d 1013, 1017 (11th Cir. 1989).

II.

The Fifth Circuit's refusal to remand the case to the district court with orders that an evidentiary hearing be conducted runs afoul of settled precedent of this Court and other circuits.

The actual conflict of interest issue is one that calls for the conducting of an evidentiary hearing where trial counsel Hootman is compelled to testify and the contours

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[5] It is noted that at least the Third Circuit "has declined to accept waivers of conflicts of interest be they actual or potential." *United States v. Cannistraro, supra,* at 1318, *citing, United States v. Moscany,* 927 F.2d 742 (3d Cir. 1991), *cert. denied,* ___ U.S. ___, 111 S.Ct. 2812, 115 L.Ed. 2d 984 (1991).

of his pre-existing relationship with Kasper, the key government witness, is explored. *See, Strouse v. Leonardo*, 928 F.2d 548, 555 (2d Cir. 1991), *citing, Wood v. Georgia*, 450 U.S. 261, 272, 101 S.Ct. 1097, 1103-1104, 67 L.Ed.2d 220 (1981) and *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992). As the record reflects, the district court never made *any* inquiry, *whatsoever*, when the revelation came to light at trial. *Cuyler v. Sullivan*, 446 U.S. 335, 342, 100 S.Ct. 1708, 1714, 64 L.Ed.2d 333 (1980), "mandates a reversal when the trial court has failed to make inquiry even though 'it knows or reasonably should know that a particular conflict exists.' " *Wood v. Georgia, supra*, at 272, n.18, 101 S.Ct., at 1104.

It has been the settled jurisprudence of this Court that where the record demonstrates the possibility of a conflict of interest there is a duty imposed on the trial court to inquire further and this is so even if it is "difficult to determine from the appellate record whether an *actual* conflict of interest (is) present." *Bonin v. California*, ___ U.S. ___, 110 S.Ct. 1506, 1507 (1990) (mem.) (Marshall, J., dissenting) (emphasis in original); *Wood v. Georgia, supra*, at 272, 101 S.Ct., at 1104.

The Fifth Circuit's reliance on *United States v. Phillips, supra*, for the proposition that where the record is " 'sufficiently complete to enable us to fairly evaluate the merits of the claim' " the issue can be resolved on direct appeal, (Appendix A at 4), is, with all respect, misplaced. In *United States v. Phillips, supra*, the ineffective assistance of counsel claim was raised *prior* to sentencing, and *new* counsel was appointed when the conflict of interest issue raised its head. As the court therein reasoned,

> "[t]he trial judge brought (defendant) Platshorn's letter to the attention of all counsel just before the hearing on sentencing began. (Within the letter, Platshorn raised various ineffective assistance of counsel claims.) Stream (defense counsel) at that time responded, point by point, to each of the allegations raised by Platshorn. In its order appointing substitute counsel for sentencing, the trial court stated that it had
>
> > every reason to believe that Mr. Stream has given his client adequate, competent, and satisfactory legal services up to this point in this case. *However, at this first suggestion of a serious conflict between the personal interest of an attorney and his client, the Court has no choice but to excuse Mr. Stream in further participation in the sentencing proceedings.*
>
> *Under these circumstances,* we believe that the record was sufficiently developed with respect to Platshorn's claim of ineffective assistance and we can properly determine the merits of the claim on this appeal." *Id.*, at 1040. (Emphasis added).

This obviously must be compared to and contrasted with the facts at bar. In *Phillips*, with Platshorn being appointed new counsel and with Mr. Stream being afforded an opportunity to respond "point by point, to each of the allegations raised by Platshorn," it is obvious that the appellate court at least had some record within which to evaluate the ineffective assistance of counsel claims.

The petitioner asserted in the Fifth Circuit, as he does now, that he is "faced with somewhat of a Hobson's choice." (Brief for Appellant at 19). By failing to raise the

issue on direct appeal, the petitioner is subject to a charge of procedural default when the matter is pursued collaterally by way of a 28 U.S.C. § 2255 petition. *See generally, United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), and *United States v. Shaid*, 937 F.2d 228 (5th Cir. 1981) (en banc), *cert. denied*, 112 S.Ct. 978, 117 L.Ed.2d 141 (1981). On the other hand, by raising the issue on direct appeal, without the benefit of independent counsel exploring the parameters of the previous relationship that existed between trial counsel Hootman and government witness Kasper, the petitioner is denied any opportunity to adduce relevant evidence for a meaningful appellate review. This is profoundly and fundamentally unfair.

In the final analysis, the Fifth Circuit's determination that it could " 'fairly evaluate the merits of the claim' " on direct review, (Appendix A at 4), is erroneous. Its own mandate that "[t]he right to effective assistance of counsel is so vital to a fair trial that *courts are compelled to examine every potential infringement of that right with the most exacting scrutiny*," *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir. 1979), *cert. denied*, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979), (emphasis added), was simply not met in the case at bar.

The Fifth Circuit's conclusion that "Hootman never represented Kasper, as Hootman was only consulted (not retained) by Kasper before Bishop's trial" (and) that "[e]ven if Hootman did represent Kasper at some point, such representation ended before Bishop's trial began" and, that therefore, "Bishop has not shown that Hootman actively represented conflicting interests," (Appendix A at 5), cannot be squared with applicable case law, the

canons of ethics, or for that matter, with the paucity of details contained in the record below. Whether Hootman was remunerated or later retained by Kasper after the initial "consultation" is of little moment. The attorney/client privilege attaches at such a conference:

> "It is imperative that the privilege attach soon after the prospective client has contacted an attorney, and certainly not later than the point at which the person reveals facts tending to establish a criminal exposure. The existence of the privilege cannot be limited to instances in which the attorney/client relationship comes to full fruition by the payment of legal fees and the performance of legal services. If that were required, a person would be compelled to retain the first attorney consulted in order to preserve the privilege. Such a requirement would ignore the reality that during early consultations the lawyer, the client, or both may choose not to formalize or continue the relationship." *In Re Grand Jury Proceedings*, 663 F.2d 1057, 1060 (5th Cir. 1981), *vacated*, 680 F.2d 1026 (5th Cir. 1982).

See also, American Bar Association's Model Code of Professional Responsibility, Canon 4, EC 4-1, DR 4-101.

As for the Fifth Circuit's belief that even if there was an attorney/client relationship, "such representation ended before Bishop's trial began," this does not address, much less grapple with the *dilemma* of *successive* representation. As previously asserted, "the absence of *simultaneous* representation is not determinative. In some circumstances, a defense lawyer's *prior* representation of a witness can give() rise to an actual conflict of interest."

Smith v. White, 815 F.2d 1401, 1405 (11th Cir.), *cert. denied*, 484 U.S. 863, 108 S.Ct. 181, 98 L.Ed.2d 133 (1987).

The "dilemma of successive representation" is given very little consideration by the Fifth Circuit's opinion. Ironically, the court casually dismisses the previous relationship that existed between trial counsel Hootman and Kasper, a relationship which was of a kind that courts have uniformly found to justify *disqualification* of defense counsel. *See*, cases cited *supra*, at 9.

While the Fifth Circuit recognized that "prejudice is presumed" where a " 'defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance," ' " *Cuyler v. Sullivan, supra*, at 350, as quoted in, *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984),[6] (Appendix A at 5), it concluded that no adverse affect on Hootman's performance was shown by the record. Noting that "Hootman vigorously cross-examined Kasper, and established that Kasper was a biased witness . . . and a liar," the court concluded that "Bishop has not shown how any actual conflict of interest adversely affected Hootman's performance." (Appendix A at 6).

But surely this is at odds with the Fifth Circuit's own pronouncement that "a defendant is denied the effective assistance of counsel in those instances where an attorney

---

[6] It is observed that *both Cuyler v. Sullivan, supra*, and *Strickland v. Washington, supra*, were *collateral attacks* wherein the appellants were afforded an opportunity to develop their claims – including that of a conflict of interest – in an evidentiary hearing.

is unable to cross-examine, or is chilled in the cross-examination of, a government witness because of the attorney/client privilege arising from counsel's prior representation of the witness . . . " *United States v. Soudan*, 812 F.2d 920, 927 (5th Cir. 1986), *cert. denied*, 481 U.S. 1052, 107 S.Ct. 2187, 95 L.Ed.2d 843 (1987), and cases cited therein. *See also, United States v. Martinez, supra.*

While the Fifth Circuit, in a footnote, acknowledged the argument that "Hootman's failure to point out Kasper's exculpatory statement during cross-examination indicates that Hootman's performance was adversely affected," the court concluded otherwise, finding that "Hootman made the strategic decision to impeach Kasper which he did effectively. . . . " (Appendix A at 6, n.2). Not only is the court's determination in this regard, flawed,[7] to reach the conclusion that Hootman's decision was "strategic" without affording Bishop *any opportunity at all* to develop the issue in an evidentiary hearing is unprecedented. It simply cannot be said, as a matter of law, based upon the present record that Hootman's choice was a valid strategic decision. Again, if this was Hootman's strategy, it was a failed one; in any event, this is precisely why an evidentiary hearing should be conducted.

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[7] It is flawed, in part, because Hootman could well have pursued *both* strategies. The record is replete with indications from the prosecution itself that Kasper was a liar with respect to much of his involvement in the present case. There was available from *no other source*, however, exculpatory testimony regarding John Bishop, Jr.

The Fifth Circuit based its conclusion that "Bishop has not shown that Hootman actively represented conflicting interests," primarily, if not exclusively, on the authority of *United States v. Olivares*, 786 F.2d 659, 663 (5th Cir. 1986). It is true, that in *Olivares*, the Court determined that the defendants therein did not demonstrate that their attorney had actively represented conflicting interests where the lawyer's representation of a codefendant ended prior to commencement of trial. It is important to realize, however, that while the court therein recognized that Galindo (defense counsel) "may have actively represented conflicting interests" earlier in the case when he represented a codefendant, as well as the defendants, "both Hector and Gustavo (Olivares) *had signed forms expressly waiving any conflict of interest arising from multiple representation.*" at 663. (Emphasis added).

This is a far cry from the facts at bar where there has been utterly no demonstration that petitioner Bishop was aware of, much less consented to and waived any conflict of interest, due to Hootman's previous attorney/client relationship with Kasper.

A.

No Showing of Harm or Prejudice Must be Made

While it is incumbent upon a defendant to establish an actual conflict of interest, no showing of harm or prejudice must be made. *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). "Unlike *competency* of representation, where an attorney's conduct may fall anywhere along a continuum ranging from the

incompetent to the superlative, conflict-laden representation is not susceptible of such fine gradations. Such representation is invidious, often escaping detection on review, and is tantamount to a denial of counsel itself." *United States v. Alvarez, supra,* at 1256-1257. (Emphasis added). In *Zuck v. Alabama, supra,* the Court held that

> "[d]etermining whether a particular attorney has yielded to the temptation a conflict presents requires a searching analysis of his performance at trial. A *cold, dispassionate appellate transcript simply cannot provide an adequate basis for assessing such a performance, for subtle variations in demeanor and depth of cross-examination cannot be reflected in the pages of a transcript.* For this reason, the mere existence of a temptation in the abstract is sufficient to preclude duality of representation." at 440. (Emphasis added).

Moreover, an actual conflict of interest is not even amenable to harmless error analysis. *Glasser v. United States,* 315 U.S. 60, 76, 62 S.Ct. 457, 467-468, 86 L.Ed. 680 (1942).

B.

Jurisdiction Exists to Order a Remand

As this Court has recognized, even where a conflict-of-interest issue has not been raised below, jurisdiction exists pursuant to 28 U.S.C. § 2106[8] to order a remand

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[8] "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of

and "to 'require such further proceedings to be had as may be just under the circumstances.' " *Wood v. Georgia, supra,* at 265, 101 S.Ct. 1100, *quoting,* R. Stern & E. Gressman, *Supreme Court Practice* § 6.27, p.460 (5th Ed. 1978). In the present case, it is irrefutable that the district court made no inquiry, of any kind, after Hootman's revelation concerning his prior relationship with Kasper was made known. It is submitted that the failure to explore with Hootman, on the record, the contours of the attorney/client relationship that existed in that regard, mandates, *at the very least,* the conducting of an evidentiary hearing, especially where, as here, the district court "knows or reasonably should know that a particular conflict exists." *Cuyler v. Sullivan, supra,* at 347.

PRAYER

For these reasons, the Petitioner respectfully prays that this Court will grant his Application for Writ of Certiorari.

Respectfully submitted,

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---

such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

APPENDIX A

Opinion of
the United States Court of Appeals
for the Fifth Circuit

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-5639

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHN ERNEST BISHOP, JR.,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(SA-91-CR-471-03)
(Filed Mar. 04, 1993)

Before POLITZ, Chief Judge, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

John Bishop was convicted of conspiracy to distribute LSD and distributing LSD, in violation of 21 U.S.C. § 841(a)(1), 846 (1988). Bishop appeals his conviction on two grounds. First, he contends that he was denied effective assistance of counsel due to his attorney's alleged conflict of interest. Second, Bishop argues that the district court abused its discretion by denying his motion for mistrial. We affirm.

I

Bishop was convicted in part upon the testimony of Chris Kasper, who testified that Bishop was his source for LSD.[1] After Bishop's attorney, Timothy Hootman, had finished presenting the evidence for Bishop's defense, the following ensued:

> HOOTMAN: I want to request that I be allowed to take the stand. Chris Kasper came to my office before all this started, and was considering hiring me, and he told me that John [Bishop] didn't have anything to do with it.
>
> [PROSECUTOR] MCCRUM: Judge, we're getting into the fact of representation of counsel, for building a – for the defense. I don't think that's –

---

[1] The facts underlying Bishop's offenses of conviction are not relevant to the issues raised on appeal, and therefore will not be discussed.

HOOTMAN: Basically it, attorney/client privilege is to encourage discussions between attorney and the client. This Mr. Kasper has already pled guilty.

MCCRUM: If he was a witness in this case, it should have come out long before this trial so that he could have gotten other counsel to do this. This is highly improper. After the trial's over, after jeopardy is already attached and this man now comes forward saying he's some kind of witness.

COURT: I'm going to sustain the Government's objection, Mr. Hootman. My concern is, he went to see you with regard to hiring you, whether there was attorney-client privilege where he – he's waiving that privilege and also you being a witness in this case, and possibly knowing that you might be a witness in this case, and have gone throughout the trial, and we get to this stage and then you think you might be a witness, I think causes some problems. So, I'm going to sustain the Government's objection to you testifying with regard to any discussions you might have had with Mr. Kasper.

HOOTMAN: Okay. That's where we rest our case.

Video Tape ("V.T.") 104, 05-21-92, 11:53:15. On appeal, Bishop argues that this discussion revealed a conflict of interest for Hootman (between Bishop and Kasper) that denied Bishop the effective assistance of counsel.

In addition, Bishop contends that the prosecution introduced prejudicial evidence of his involvement with marijuana. During the prosecution's direct examination of Steven Griebe, Kasper's former roommate, the following occurred:

MCCRUM: All right. Did you [Griebe] ever return to [Bishop's] apartment?

GRIEBE: I think one more time.

MCCRUM: Okay. Who and what were the circumstances in which you returned to that apartment?

GRIEBE: I went to the apartment another time and it was for a large amount of marijuana.

MCCRUM: Okay. Was John Bishop there?

GRIEBE: Yes, he was.

MCCRUM: All right. Did you –

HOOTMAN: May we approach, your honor? I would object to any reference to marijuana or any other types of drugs except for LSD.

MCCRUM: All right. It was a surprise to me, Judge. I guess an instruction to the jury might be appropriate at

> this time. . . . It's my understanding his only visits to the apartment were for the purpose of LSD.

Id., 05/21/92, 08:58:48. The district court denied Bishop's motion for mistrial, and instructed the jury as follows:

> Members of the jury, I'm going to ask you to disregard the response that was just given by the witness. This case deals with allegations against Mr. Bishop involving LSD and you should not consider any other drugs. There's no other allegations, no other evidence in this case regarding any other drugs involving Mr. Bishop; only the allegations that he was involved in the distribution of LSD. So please disregard what the witness just said. . . .

Id., 05/21/92, 09:00:43.

Bishop was subsequently convicted of conspiring to distribute LSD, and distributing LSD, in violation of 21 U.S.C. § 841(a)(1), 846. He was sentenced to 121 months imprisonment and five years supervised release. Bishop appeals his conviction, arguing that: (1) he was denied effective assistance of counsel due to Hootman's alleged conflict of interest; and (2) the district court abused its discretion in denying his motion for mistrial based upon Griebe's testimony that Bishop was also involved with marijuana.

II

A

Bishop first argues that he was denied the effective assistance of counsel because a conflict of interest existed between his counsel and Kasper, the prosecution's principal witness. Bishop did not raise this claim before the district court. Generally, "a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court." *United States v. Ugalde*, 861 F.2d 802, 804 (5th Cir. 1988), *cert. denied*, 490 U.S. 1097, 109 S. Ct. 2447, 104 L. Ed. 2d 102 (1989). However, because the record here is "sufficiently complete to enable us to fairly evaluate the merits of the claim," *id.*, we determine the merits of Bishop's claim on this appeal. *See, e.g., United States v. Phillips*, 664 F.2d 971, 1040 (5th Cir. 1981) (deciding ineffective assistance of counsel claim on direct appeal where record sufficiently developed on claim), *cert. denied*, 457 U.S. 1136, 102 S. Ct. 2965, 73 L. Ed. 2d 1354 (1982); *United States v. Brown*, 591 F.2d 307, 310 (5th Cir.) (same), *cert. denied*, 442 U.S. 913, 99 S. Ct. 2831, 61 L. Ed. 2d 280 (1979).

We examine claims of ineffective assistance of counsel to determine whether counsel's performance was both objectively deficient and prejudicial to the petitioner. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). Where an ineffective assistance claim is based upon conflicts of interest, "prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Id.* at 692, 104 S. Ct. at 2067

(quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 1718-19, 64 L. Ed. 2d 333). Bishop does not dispute that he has failed to show prejudice. *See* Brief for Bishop at 10-19. Rather, he contends that prejudice should be presumed in his case because Hootman actively represented conflicting interests and such conflict adversely affected his performance. We disagree.

The record indicates that Hootman never represented Kasper, as Hootman was only consulted (not retained) by Kasper before Bishop's trial. *See* V.T. 104, 05/21/92, 11:53:15. Even if Hootman did represent Kasper at some point, such representation ended before Bishop's trial began. Thus, Bishop has not shown that Hootman actively represented conflicting interests. *See United States v. Olivares*, 786 F.2d 659, 663 (5th Cir. 1986) (holding that defendant did not demonstrate that his attorney actively represented conflicting interests where attorney's representation of co-defendant terminated long before trial).

Moreover, even if Hootman was operating under an actual conflict of interest when he cross-examined Kasper, the record indicates that this assumed conflict did not adversely affect Hootman's performance. Hootman vigorously cross-examined Kasper, and established that Kasper was a biased witness, *see* V.T. 102, 05/20/92, 02:14:22, and a liar. *See, e.g., id.*, 05/20/92, 02:25:16; 05/20/92, 02:16:32. Therefore, Bishop has not shown how any actual conflict of interest adversely affected Hootman's performance.[2]

---

[2] While it may be argued that Hootman's failure to point out Kasper's exculpatory statement during cross-examination indicates that Hootman's performance was adversely affected, we conclude otherwise. Hootman had the option of either

See Olivares, 786 F.2d at 663 (holding that defendant did not demonstrate that his attorney's performance was adversely effected, where attorney "thoroughly cross-examined [his former client and co-defendant] and exposed him as a liar"). Because prejudice cannot be presumed in this case, and Bishop has not shown how he has been prejudiced, his ineffective assistance of counsel claim is without merit.

B

Bishop also contends that the district court abused its discretion by denying his motion for mistrial based upon Griebe's prejudicial testimony that Bishop was also involved with marijuana. We review for abuse of discretion a denial of a motion for mistrial. *United States v. Baresh*, 790 F.2d 392, 402 (5th Cir. 1986).

In the case of erroneously elicited testimony, striking the testimony "and admonishing the jury to disregard it normally serves to cure the error." *United States v. Escamilla*, 666 F.2d 126, 128 (5th Cir. 1982); *see also Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S. Ct. 3102, 3109 n.8, 97 L. Ed. 2d 618 (1987) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence

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impeaching Kasper, whose testimony concerning Bishop's involvement was certainly damaging, or building up Kasper's credibility in anticipation of bringing out his exculpatory statement concerning Bishop. Because Hootman made the strategic decision to impeach Kasper – which he did effectively – we cannot conclude that Hootman's performance was adversely affected in any way.

inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." (citations omitted)). Bishop has not shown any reason why the jury may have been unable to follow the court's curative instruction. The testimony concerning Bishop's involvement with marijuana was only an isolated occurrence in a trial which was replete with admissible evidence concerning LSD transactions. Because of the curative instruction and the strength of the prosecution's case,[3] we cannot conclude that the district court abused its discretion in denying Bishop's motion for mistrial. *See United States v. Rodriguez-Arevalo*, 734 F.2d 612, 616 (5th Cir. 1984) (finding no abuse of discretion in denying motion for mistrial, based upon the strength of evidence, coupled with a curative instruction).

III

For the foregoing reasons, we AFFIRM.

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[3] *See United States v. Rodriguez-Arevalo*, 734 F.2d 612, 615 (5th Cir. 1984) ("Prejudicial testimony will not mandate a mistrial when there is other significant evidence of guilt which reduces the likelihood that the otherwise improper testimony had a substantial impact upon the verdict of the jury.").

APPENDIX B

Denial of Petition for Rehearing
United States Court of Appeals
for the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5639

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN ERNEST BISHOP, JR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(April 7, 1993)

Before POLITZ, Chief Judge, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

APPENDIX C

Texas Disciplinary Rules of

Professional Conduct

Texas Disciplinary Rules of Professional Conduct

Art. 10, § 9. PROFESSIONAL CONDUCT

RULE 1.05. CONFIDENTIALITY OF INFORMATION

(a) "Confidential information" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer also may reveal unprivileged client information:

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation

reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

(Adopted eff. Jan. 1, 1990; amended Oct. 23, 1991.)

RULE 1.06 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

(Adopted eff. Jan. 1, 1990.)

RULE 1.09 CONFLICT OF INTEREST: FORMER CLIENT

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

(Adopted eff. Jan. 1, 1990; amended Oct. 23, 1991.)

(2)

Supreme Court, U.S.
FILED
SEP 10 1993
OFFICE OF THE CLERK

No. 93-50

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN ERNEST BISHOP, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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11 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner was not denied the effective assistance of counsel due to an alleged conflict of interest.

2. Whether the court of appeals erred by reaching the merits of petitioner's claim of ineffective assistance of counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-50

JOHN ERNEST BISHOP, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals, Pet. App. 1-9, is not reported, but its judgment is noted at 987 F.2d 772 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1993. A petition for rehearing was denied on April 7, 1993. Pet. App. 10. The petition for a writ of certiorari was filed on July 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to distribute LSD, in violation of 21 U.S.C. 846, and distributing LSD, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 121 months' imprisonment, five years' supervised release, and a $2,000 fine. The court of appeals affirmed. Pet. App. 1-9.

From 1989 to 1991, petitioner regularly supplied LSD to Chris Kasper, who resold the LSD to students at the college that Kasper attended. In 1991, Kasper sold LSD to a state undercover agent. Kasper subsequently led state and federal undercover agents to petitioner's apartment. While the agents waited outside, petitioner gave Kasper some LSD for resale to the agents for $2,500. In November 1991, law enforcement agents arrested Kasper in front of petitioner's apartment building. The agents executed a search warrant at petitioner's apartment on the same day and seized LSD and documents showing that petitioner was a drug dealer. Gov't C.A. Br. 3-10.

Kasper testified for the government at petitioner's trial. On cross-examination, Kasper admitted that he was hoping for a reduced sentenced based on his cooperation with the government. He also admitted that he had repeatedly lied to the agents about petitioner's role, his own role, and the participation of third parties in the LSD scheme. Gov't C.A. Br. 14-15. At the end of the defense case, petitioner's attorney sought to testify that before the case began, Kasper had come to his office seeking legal representation and had told him that petitioner was not involved in the LSD scheme. After the government objected that it was "highly improper" for defense counsel to announce at that late date that "he's some kind of witness," the district court barred peti-

tioner's attorney from testifying about any discussions that he may have had with Kasper. Pet. App. 3.

The court of appeals affirmed. Among other arguments, it rejected petitioner's claim that he had been denied the effective assistance of counsel. First, the court held that although it normally would not consider an ineffective assistance claim that had not been raised below, the record in this case was sufficiently complete for the court to determine the merits of the claim. Pet. App. 6. The court next held that petitioner's attorney did not actively represent conflicting interests at trial because he never represented Kasper, having only consulted with him. In any event, any assumed conflict did not adversely affect the attorney's performance since the record showed that the attorney vigorously cross-examined Kasper and established a foundation for the jury to conclude that Kasper was a biased witness and a liar. The court further rejected petitioner's claim that the attorney erred in failing to point out Kasper's exculpatory statement to him on cross-examination. The court explained that the attorney had the option of impeaching Kasper or building up his credibility in anticipation of bringing out the exculpatory statement, and that the attorney's choice between those strategies was reasonable. *Id.* at 7-8.

ARGUMENT

1. Petitioner first contends (Pet. 7-13) that he was deprived of the right of effective assistance of counsel. There is no merit to that claim.

A criminal defendant has a Sixth Amendment right to the effective assistance of counsel. To show a violation of that right, a defendant must show that his counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). If a defendant

claims that his attorney performed under a conflict of interest, prejudice will be presumed only if the defendant shows that the attorney "actively represented conflicting interests" and that the conflict "adversely affected" the attorney's performance. *Id.* at 692.

An attorney who represents a criminal defendant after having represented a client who is now a government witness against the defendant faces a potential conflict of interest in that his interest in vigorously cross-examining his prior client on behalf of the defendant may conflict with his duty to preserve his prior client's secrets and confidences. See *United States* v. *Bowie*, 892 F.2d 1494, 1501 (10th Cir. 1990); *United States* v. *Soudan*, 812 F.2d 920, 927 (5th Cir. 1986), cert. denied, 481 U.S. 1052 (1987). But because a potential conflict of interest is not enough to demonstrate ineffective assistance of counsel, a defendant does not establish ineffective assistance merely by showing that his attorney cross-examined a former client. *United States* v. *Olivares*, 786 F.2d 659, 663 (5th Cir. 1986).

Petitioner's attorney did not actively represent conflicting interests at petitioner's trial. First, because the attorney never represented Kasper, it was unlikely that Kasper divulged any secrets or confidences to the attorney during their brief consultation. In addition, once Kasper pleaded guilty, it was unlikely that anything Kasper had told the attorney was still a secret. Accordingly, the attorney was not burdened by a need to preserve Kasper's secrets when he cross-examined Kasper at petitioner's trial, and there is no reason to believe that the attorney's cross-examination of Kasper was restrained because of the attorney's prior consultation with Kasper.

In addition, the attorney's performance at trial was not adversely affected by his prior consultation with Kasper. As noted by the court of appeals, Pet. App. 7, petitioner's

attorney "vigorously" cross-examined Kasper at trial. Petitioner's attorney established that Kasper was expecting a lenient sentence in exchange for his cooperation with the government and that Kasper had repeatedly lied to the undercover agents about his role, petitioner's role, and the role of third parties in the offense. See *United States* v. *Olivares*, 786 F.2d at 663 (attorney was not "adversely affected" by his prior representation of a witness when he thoroughly cross-examined the witness at trial and exposed him as a liar).[1]

2. Petitioner also contends (Pet. 13-22) that the court of appeals erred in reaching the merits of his ineffective assistance of counsel claim. There is no merit to that contention.

The basis for petitioner's claim that the court of appeals should not have reached his ineffective assistance argument is that he did not raise the issue in the district court. For that reason, he contends, the record was insufficient to permit the court of appeals to reject his

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[1] Petitioner contends (Pet. 19) that his attorney's failure to cross-examine Kasper about his exculpatory statement to the attorney showed that he was actively representing conflicting interests. But as noted by the court of appeals, Pet. App. 7-8, once petitioner's attorney decided to impeach Kasper by showing that he was a liar, it would have made little sense to then suggest that Kasper was telling the truth when he said that petitioner was innocent. A major point of counsel's cross-examination of Kasper was to establish that Kasper lied when he characterized petitioner's role in the offense. Counsel could hardly then do an about-face and rely on the credibility of a statement by Kasper regarding petitioner's alleged non-involvement in the criminal scheme. Of course, counsel could not have introduced the unsworn prior inconsistent statement of Kasper through counsel's own testimony in the defense case as proof of petitioner's innocence. Setting aside the impropriety of counsel's being a witness in a case in which he was representing a party, Kasper's statement was hearsay and not admissible for its truth. See Fed. R. Evid. 801(d)(1)(A).

claim. But if petitioner believed that the record needed further factual development, he should have asked the court of appeals to remand the case for an evidentiary hearing on the issue, or he should have filed a separate action under 28 U.S.C. 2255 raising the issue. See *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984). He should not now complain about the alleged inadequacy of the record after he urged the court of appeals to decide the issue on the merits.[2]

To be sure, courts of appeals normally will not reach the merits of an ineffective assistance of counsel claim that is raised for the first time on appeal. Instead, they will advise the defendant to raise the issue in a separate Section 2255 motion. If the court of appeals determines that the record is adequate, however, it may reach the merits of the ineffective assistance of counsel claim even though the issue was not raised below. See, *e.g.*, *United States* v. *Guerrero*, 938 F.2d 725, 726-727 n.1 (7th Cir. 1991); *United States* v. *Wunder*, 919 F.2d 34, 37 (6th Cir. 1990); *United States* v. *Hilliard*, 752 F.2d 578, 580 (11th Cir. 1985); *United States* v. *Aulet*, 618 F.2d 182, 185-190 (2d Cir. 1980). Thus, having concluded that the record was adequate to decide petitioner's ineffective assistance of counsel claim, the court of appeals properly reached the merits of the claim.[3]

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[2] In the court of appeals, petitioner did not ask for a remand for an evidentiary hearing on the issue. Although petitioner noted in passing that an evidentiary hearing might be appropriate to help decide the issue, Pet. C.A. Br. 19, his prayer for relief asked only for a reversal of his conviction and a new trial, *id.* at 24.

[3] Petitioner's disagreement (Pet. 13-16) with the court of appeals concerning the adequacy of the record raises a purely factual question that warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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